Fair Housing Act Challenges to the Use of Consumer Credit Information in Homeowners Insurance Underwriting: Is the McCarran-Ferguson Act a Bar?

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Despite the promise of the Fair Housing Act, structural inequality in the housing market persists. One of the most notable manifestations of this inequality is the racial and ethnic divide in patterns of homeownership. Although many factors contribute to this disparity, civil rights and consumer-protection groups have highlighted insurers' practice of using consumer credit information to price homeowners insurance policies and to decide who qualifies for coverage. These groups argue that this practice can limit certain minority groups' access to insurance coverage. However, plaintiffs that have sought to challenge this practice under the Fair Housing Act (FHA) have met an unexpected foe: the McCarran-Ferguson Act (MFA), a federal statute that mandates state preemption of federal law if that federal law impairs, invalidates, or supersedes state insurance law ("reverse preemption"). Where a state law regulates the use of credit information in insurance decision-making, the MFA has been invoked to bar recovery for insurance discrimination under the FHA. This Note examines courts' conflicting interpretations of the MFA in "insurance scoring" cases and argues that future courts should adopt a narrow approach to MFA reverse preemption, which would allow claims under the FHA to proceed.

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I. INTRODUCTION

> *The Valuator should investigate areas surrounding the location to determine whether or not incompatible racial and social groups are present, to the end that an intelligent prediction may be made regarding the possibility or probability of the location being invaded by such groups. If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes.*[1]

Gone are the days when explicit racial considerations were built into official government housing policy.[2] Gone, too, is the era of official tolerance and even encouragement of discrimination in private housing sales and underwriting decisions.[3] In the three-quarters of a century since the Federal Housing Administration promulgated the overtly race-conscious underwriting guidelines quoted above, the fair housing movement has won critical victories at all levels of government and has enshrined the right to obtain shelter free from discrimination as a key civil right.[4]

And yet, equal access to housing and unconstrained housing choice remain important, and unfulfilled, public policy objectives.[5]

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1. U.S. FED. HOUS. ADMIN., UNDERWRITING MANUAL pt. II, ¶ 233 (1936).

2. *See*, *e.g.*, KEVIN FOX GOTHAM, RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT 57–63 (2002) (detailing policy of Federal Housing Administration in 1930s of refusing to insure mortgages in "racially mixed" neighborhoods).

3. *See*, *e.g.*, STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 179 (2000) (describing California constitutional amendment passed in 1964 protecting homeowner's right to sell only to whom he or she wished to sell).

4. *See generally* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION §§ 1:1, 30:1 (2011), *available at* Westlaw HDISLL (describing important events of "modern era of fair housing law" and numbers of states and localities with laws or constitutional amendments protecting fair housing).

5. *See* John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1071 (1998) ("Housing is the civil rights area that has most been plagued by slow, small advances, where the possibility for real change is viewed as most remote."); Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1191 (2011) ("The persistence of housing discrimination more than forty years after the passage of the federal Fair Housing Act (FHA) of 1968 is among the most intractable civil rights puzzle."); Brian Patrick Larkin, Note, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1647–52 (2007) (noting persistence of residen-

Though minorities are no longer prevented from living in certain neighborhoods as a matter of official policy, what one observer has termed "maturing disparities" still endure, arising from "conduct that is accepted industry practice, but when examined critically, shows exclusionary patterns."[6] One area that has received scrutiny in recent years is structural inequality in insurance and credit markets, and its effects on free and full housing choice.[7] For example, minority borrowers take out high-interest-rate (i.e. subprime) mortgages at much higher rates than non-minorities,[8] and minorities are far more likely to live in older and less valuable homes, which insurers often categorically refuse to insure.[9] Curbing minorities' access to insurance markets and steering

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tial segregation and housing discrimination and arguing for additional policy action to realize legislative goals of FHA).

6. Cassandra Jones Havard, *"On the Take": The Black Box of Credit Scoring and Mortgage Discrimination*, 20 B.U. PUB. INT. L.J. 241, 245 (2011). This is not to say that intentional housing discrimination has ceased to exist; to the contrary, several contemporary studies have found that discrimination against minorities in rental and sales housing markets is alive and well. *See* Margery Austin Turner, et al., *Discrimination in Metropolitan Housing Markets*, THE URBAN INST. iii–v (Nov. 2002), http://www.urban.org/UploadedPDF/410821_Phase1_Report.pdf (finding a significant level of housing discrimination against African-Americans and Hispanics nationwide, particularly in the form of landlords' refusal to rent available units); Fred Freiberg, *A Test of Our Fairness*, 41 URB. LAW. 239, 242–43 (2009) (describing the author's personal experience uncovering illegal discrimination in housing rental and sales markets in Wisconsin and New York City).

7. *See*, *e.g.*, Jared Ruiz Bybee, *Fair Lending 2.0: A Borrower-Based Solution to Discrimination in Mortgage Lending*, 45 U. MICH. J.L. REFORM 113, 116–19, 143–49 (2011) (identifying evidence of correlation between race of applicant and racial makeup of neighborhood, and likelihood of receiving subprime loan; arguing for adoption of borrower-centric framework for fair lending laws); Charles L. Nier, III & Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. 941, 942 (2011) (describing the impact of the financial crisis as "the preeminent civil rights issue of our time," and discussing implications of access to credit for housing, wealth accumulation, and other issues).

8. ROBERT B. AVERY, ET AL., BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE 2008 HMDA DATA, FEDERAL RESERVE BULLETIN A169 (2010), *available at* http://www.federalreserve.gov/pubs/bulletin/2010/pdf/hmda08final.pdf (finding that, in 2007, 29.7% of black borrowers and 23.6% of Hispanic borrowers obtained a subprime mortgage, while only 8.4% of non-Hispanic whites received the same). Racial disparities in subprime lending have declined, though, as the incidence of subprime lending has declined overall over the last several years. *Id.* Recent lawsuits have also helped to uncover racial targeting practices used by mortgage brokers, including marketing subprime loan products at black churches. *See* Declaration. of Elizabeth M. Jacobson at 10, Mayor & City Council of Balt. v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847 (2010) (No. JFM 1:08 CV-00062).

9. Gregory D. Squires, *Racial Profiling, Insurance Style: Insurance Redlining and the Uneven Development of Metropolitan Areas*, 25 J. URB. AFF. 391, 400 (2003).

them towards home mortgage loans with more onerous terms has helped to perpetuate the racial wealth gap[10] and harden patterns of residential segregation.[11] The recent home foreclosure crisis has only exacerbated these patterns, as it has had a disproportionate impact on minorities.[12]

The persistence of this racial divide in wealth and homeownership patterns calls out for diagnosis and reform. One of the most contentious factors in recent years has been the use of consumer credit information, such as credit scores[13] in homeowners insurance underwriting and ratemaking decisions.[14] Since 2000, thirty-eight states have passed statutes and administrative rules regulating the use of credit information in insurance decision-making.[15] These laws permit insurers, within certain parame-

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10. According to 2009 data, the median wealth of white households is twenty times higher than that of black households, and eighteen times that of Hispanic households. Rakesh Kochhar Et Al., *Wealth Gap Rises to Record Highs Between Whites, Blacks and Hispanics*, PEW RESEARCH CTR. 1 (July 26, 2011), http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf. Due in part to the bursting of the housing bubble followed by the recession, from 2005 to 2009, inflation-adjusted median household wealth fell by 53% for black families, 66% for Hispanics, compared to only 16% for whites. *Id*.

11. *See*, *e.g.*, Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 632, 641 (2010) (finding that black residential dissimilarity and spatial isolation data are predictors of foreclosure rates across the country, and noting that foreclosures resulting from subprime lending has further contributed to segregation).

12. *See* Alan M. White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 S.C. L. REV. 677, 678 (2009) ("As a wave of foreclosures sweeps across the nation, black and Hispanic families are seeing billions in accumulated housing wealth evaporate as a consequence of their overrepresentation in the high cost, high risk subprime mortgage sector.").

13. A "credit score" is "a numerical calculation intended to represent the specific level of risk that a person or entity brings to a particular transaction." Ian O'Neill, *Disparate Impact, Federal/State Tension, and the Use of Credit Scores by Insurance Companies*, 19 LOY. CONSUMER L. REV. 151, 152 (2007)

14. *See generally id.* (detailing the "legal turmoil" surrounding the use of credit information to price insurance products, including various state and federal laws regulating the practice).

15. *Using Credit Scoring and Credit History for Ratemaking*, 50 STATE STATUTORY SURVEYS: INSURANCE: POLICIES AND PREMIUMS (2011), *available at* Westlaw 0110 SURVEYS 47 [hereinafter *Credit Scoring and Credit History*]. One possible reason for this surge in legislative activity is that, in recent years, technological and statistical advances have made it easier for insurers to develop proprietary models incorporating credit information. *Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance*, FED. TRADE COMM'N 10 (July 2007), http://www.ftc.gov/os/2007/07/P044804FACTA_Report_Credit-Based_Insurance_Scores.pdf. Insurers' heightened reliance on credit information has in turn come under increased scrutiny by interest groups and legislatures. *See id.* at 11–12.

ters, to include consumers' "insurance scores" in their pricing and underwriting models.[16] An insurance score is a composite number that incorporates an individual's previous credit performance, current level of indebtedness, length of credit history, new credit or pursuit of new credit, and type of credit used.[17] But "[u]nlike a traditional credit score, which is designed to predict the likelihood that a consumer will default on a financial obligation, an insurance score is designed to predict the likelihood that the insured will file a claim within a specific window of time."[18]

Industry groups maintain that insurance scoring allows providers to more closely align premiums with risk, thereby leading to more competition and lower prices in the market overall.[19] While consumer groups accept that there is a correlation between credit history and risk, they argue that "there is no explanation for *why* a person with a lower credit score is more likely to cause a higher loss to insurers" as "there does not appear to be an easily identifiable and logical causal link between a consumer's credit history and whether she will have . . . an accident with her home."[20] Moreover, a number of studies have indicated that insurance scoring may have a disparate impact on minorities and low-income consumers, substantially limiting coverage and increasing premiums.[21] As a result, consumer groups have urged

16. *Credit Scoring and Credit History*, *supra* note 15.

17. *What's in My FICO Score*, MYFICO, http://www.myfico.com/crediteducation/whatsinyourscore.aspx (last visited Oct. 4, 2012).

18. O'Neill, *supra* note 13, at 152.

19. *See* ROBERT DETLEFSEN, AM. LEGISLATIVE EXCH. COUNCIL, IN ALL FAIRNESS: THE PROPRIETY OF USING CREDIT-BASED INSURANCE SCORING 4 (2003) (on file with author) ("Where insurance markets are healthy and competitive and where insurers have the means to distinguish among varying degrees of risk, insurance companies will favor a regime of insurance regulation based more on the individuated-risk standard [that incorporates credit scores] than on the egalitarian standard [that prohibits insurers from charging different rates based on risk that is beyond the insured's control]."); *Credit-Based Insurance Scoring: Separating Facts from Fallacies,* NAT'L ASSOC. OF MUT. INS. COS. 1 (Feb. 2010), http://www.namic.org/pdf/publicpolicy/090306InsuranceScoring.pdf [hereinafter *Credit-Based Insurance Scoring*] (defending the use of insurance scores on competition and coverage grounds).

20. Chi Chi Wu, *Credit Scoring and Insurance: Costing Consumers Billions and Perpetuating the Economic Racial Divide*, NAT'L CONSUMER LAW CTR. & CTR. FOR ECON. JUSTICE 4 (2007), http://ww w.cej-online.org/
NCLC_CEJ_Insurance_Scoring_Racial_Divide_0706.pdf.

21. *See* Brent Kabler, *Insurance-Based Credit Scores: Impact on Minority and Low Income Populations in Missouri*, STATE OF MO. DEP'T OF INS. 11, 17 (Jan. 2004), http://insurance.mo.gov/reports/credscore.pdf (finding robust relationship between minority concentration in a ZIP code and credit scores, as well as race/ethnicity on

the adoption of less discriminatory alternatives to insurance scoring and more consumer protection in the marketplace.[22]

One of the strongest legal tools for effectively addressing this problem is the disparate impact standard, used to challenge practices that have the effect of discriminating against members of a protected class, even where no intent to discriminate is present.[23]

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individual level and credit score, even after controlling for income, education, marital status, and unemployment); *Task Force on the Use of Credit Reports in Underwriting Automobile and Homeowners Insurance,* FLA. DEP'T OF INS. 10 (Jan. 23, 2002), http://www.naic.org/documents/topics_credit_scoring_fl.pdf (finding it "more likely than not" that minorities and low-income consumers are disproportionately impacted by insurance scoring, resulting in difficulty in obtaining coverage and higher premiums); *Use of Credit Information by Insurers in Texas,* TEX. DEP'T OF INS. 13–15 (Dec. 30, 2004), http://www.tdi.texas.gov/reports/documents/creditrpt04.pdf (finding consistent pattern of overrepresentation of African-Americans and Hispanics in worse credit-score categories and underrepresentation in better categories); *see also* Wu, *supra* note 20, at 12–16 (discussing additional studies of disparities in credit scores by race). *But see Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit,* BD. OF GOVERNORS OF THE FED. RESERVE SYS. S-4 (Aug. 2007), http://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf (finding that credit scores are not a reliable proxy for race or ethnicity, and asserting that "[c]redit scoring likely increases the consistency and objectivity of credit evaluation and thus may help diminish the possibility that credit decisions will be influenced by personal characteristics or other factors prohibited by law, including race or ethnicity.").

22. *See* Norma P. Garcia, *Score Wars: The Case for Banning the Use of Credit Information in Insurance,* CONSUMERS UNION 24–25 (2006), http://www.consumersunion.org/pdf/ScoreWars.pdf (proposing model law barring insurers from using consumer credit information in decision-making); Wu, *supra* note 20, at 1.

23. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The Supreme Court first announced the disparate-impact standard in *Griggs*, a case construing Title VII of the Civil Rights Act of 1964 to prohibit employment practices that are "fair in form, but discriminatory in operation." 401 U.S. at 431. While all federal circuits that have considered the issue have concluded that such an "effects" test is available under the FHA, courts are split on how to apply it. The two most commonly applied disparate-impact standards are the balancing test and the Title VII burden-shifting test. Lindsey E. Sacher, Note, *Through the Looking Glass and Beyond: The Future of Disparate Impact Doctrine Under Title VIII*, 61 CASE W. RES. L. REV. 603, 613 (2010). Courts following the balancing-test approach evaluate the following four factors when assessing disparate-impact claims: (1) the strength of the plaintiff's showing of a discriminatory effect; (2) some evidence of discriminatory intent; (3) defendant's interest in taking the contested action; and (4) whether "the plaintiff seek[s] to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing." Metro. Hous. Dev. Corp. v. Vill. of. Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977). According to the burden-shifting framework, once a plaintiff makes out a prima facie case of housing discrimination, the burden shifts to the defendant to provide a justification for the contested action and to show no less discriminatory course of action existed; the plaintiff then has the opportunity to demonstrate that other alternatives did, in fact, exist. Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148–49 (3d Cir. 1977). Two circuits follow a "hybrid" approach, in which courts weigh factors (2) and (4) of the balancing-test approach after allowing the plaintiff to make out a prima facie case, and the defendant to articulate a legitimate, non-

However, the first obstacle in marshaling this standard against the use of insurance scoring is simply getting into court, since the threshold issue in many cases is whether or not the claim is barred under the McCarran-Ferguson Act (MFA).[24]

The MFA is a federal statute that mandates state preemption of federal law ("reverse preemption")[25] in the area of insurance if the federal law invalidates, impairs or supersedes state law. In cases brought in the 1980s and 1990s challenging insurance "redlining" — a practice in which "insurers either decline to write insurance or charge higher rates for people who live in particular areas, especially those with large or growing minority populations"[26] — under the federal Fair Housing Act (FHA) and other civil rights laws, courts uniformly rejected insurers' arguments that the claims were barred under the MFA.[27] Given that no state statutorily permitted such a practice, courts reasoned that the application of a federal civil rights statute would not interfere with any state law, and held that the MFA did not apply. After these cases were decided, the MFA reverse preemption issue seemed so cut and dried that one commentator predicted that

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discriminatory justification. *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49 (1st Cir. 2000); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934–35 (2d Cir. 1988), *aff'd per curiam*, 488 U.S. 15 (1988).

The Supreme Court was slated to resolve this split, and decide whether a disparate-impact standard exists at all under the FHA, during October Term 2011–12, after it granted certiorari to *Magner v. Gallagher*, 132 S. Ct. 548 (2011). *Magner* pitted landlords of low-income housing properties against the City of St. Paul, Minnesota, with the landlords arguing that the city's aggressive enforcement of the housing code against them had a disparate impact on racial minorities. Gallagher v. Magner, 619 F.3d 823, 833 (8th Cir. 2010), *reh'g denied*, 636 F.3d 380 (8th Cir.), *cert. granted*, 132 S. Ct. 548 (2011), *cert dismissed*, 132 S. Ct. 1306 (2011). However, the case was voluntarily dismissed when the city "[b]ow[ed] to pressure from civil rights groups and housing advocates nationwide" and "revoked its cert petition." Eric W.M. Bain, Note, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 WM. MITCHELL L. REV. 1434, 1454 (2012) (citations omitted). "Mayor Coleman feared an increasingly conservative and pro-business Court would likely have delivered Pyrrhic victory for the City that would weaken disparate impact in civil rights enforcement." *Id.* (citations omitted).

24. 15 U.S.C. §§ 1012–15 (2006).

25. This Note will refer to state preemption of federal law as "reverse preemption," since it is typically federal law that preempts state law, according to the Supremacy Clause of the U.S. Constitution. *See* McCulloch v. Maryland, 17 U.S. 316, 327 (1819).

26. 1 PAUL BARRON ET AL., FEDERAL REGULATION OF REAL ESTATE AND MORTGAGE LENDING § 12:23 (4th ed. 2004), *available at* Westlaw FRREML. *See also infra* Part II.C.2.

27. *See* Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1363 (6th Cir. 1995); NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 295 (7th Cir. 1992); Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 421 (4th Cir. 1984).

sanctions would be imposed on insurers who raised the MFA as a defense.[28]

However, plaintiffs who have attempted to challenge the practice of insurance scoring under the FHA have found that MFA reverse preemption presents a real barrier. Now that states have enacted laws regulating insurance scoring, insurers can point to specific statutes that may be impaired by the application of federal law, and can legitimately argue that the MFA bars these claims.[29] Federal courts deciding whether these lawsuits are barred under the MFA have reached divergent conclusions. Some have narrowly construed "impairment" under the MFA to find that the FHA simply complements state insurance laws,[30] while others have adopted a broad construction, under which the FHA impermissibly impairs state law and must be reverse-preempted.[31]

This Note offers an inquiry into MFA reverse preemption of claims challenging insurance scoring under the FHA according to a disparate-impact theory of liability, highlighting an area of tension between federal civil rights laws and state regulation. The Note's thesis is that the FHA complements state laws banning discrimination in insurance and that the MFA should be narrowly construed to avoid reverse preemption in most insurance scoring challenges. By eliminating this bar, courts can allow the dis-

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28. John F. Stanton, *The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination*, 31 HOFSTRA L. REV. 141, 157 (2002) ("One of insurers' favorite threshold defenses in FHA cases is that the FHA is preempted by the McCarran-Ferguson Act. This argument has been rejected so many times, one wonders why insurers continue to pursue such a fruitless and time-wasting argument in FHA cases. The time may not be far off when a court imposes sanctions against an insurer for raising a McCarren-Ferguson [sic] defense against an FHA lawsuit.").

29. *Cf.* William E. Murray, *Homeowners Insurance Redlining: The Inadequacy of Federal Remedies and the Future of the Property Insurance War*, 4 CONN. INS. L.J. 735, 759 (1998) ("Arguments in favor of preemption of Fair Housing Act claims may begin to resurface, especially in light of continued state efforts to regulate and proscribe redlining practices.").

30. *See* Dehoyos v. Allstate Corp., 345 F.3d 290 (5th Cir. 2003); Lumpkin v. Farmers Grp., Inc., No. 05-2868 MA/V, 2007 WL 6996584 (W.D. Tenn. Apr. 26, 2007), *reconsideration denied,* 2007 WL 6996777 (W.D. Tenn. July 6, 2007).

31. *See* Saunders v. Farmers Ins. Exch. 537 F.3d 961 (8th Cir. 2008); Taylor v. Am. Family Ins. Grp., No. 8:07CV493, 2008 WL 3539267 (D. Neb. Aug. 11, 2008); McKenzie v. S. Farm Bureau Cas. Ins. Co., No. 3:06CV013-B-A, 2007 WL 2012214 (N.D. Miss. July 6, 2007); Ojo v. Farmers Grp., Inc., 356 S.W.3d 421 (Tex. 2011).

parate-impact standard to help end segregation and inequality in the housing market.

Part II gives an overview of the MFA and the FHA, and sets out the principles of reverse preemption that were established in the redlining cases. Part III then explains how courts have applied these principles in cases challenging insurance scoring under the FHA. This Part shows that, unlike in the redlining cases, where courts invariably held that MFA reverse preemption did not apply, courts are split over whether the FHA is reverse-preempted by state statutes expressly regulating insurance scoring. Finally, Part IV outlines the deficiencies of the broader test of reverse preemption that some courts have adopted and argues for an alternative approach under which reverse preemption has limited ability to thwart the anti-discrimination goals of federal civil rights laws.

II. THE STATUTORY LANDSCAPE

A web of state and federal laws regulate the use of insurance scoring. Arguably the most important piece of this structure is the MFA,[32] which determines whether state or federal law applies to a given challenge to insurance practices. Part II.A discusses the history and purpose of the MFA. Part II.B outlines how the statute operates. Part II.C discusses substantive state and federal laws regulating the use of insurance scoring. Finally, Part II.D provides a case study of how these substantive statutes have interacted with the MFA in the context of insurance redlining.

A. HISTORY AND PURPOSE OF THE MFA

Congress enacted the MFA in response to two Supreme Court cases, *Paul v. Virginia*[33] and *United States v. South-Eastern Underwriters Ass'n*,[34] that grappled with the scope of congressional power to regulate the insurance industry under the Interstate Commerce Clause.[35]

32. 15 U.S.C. §§ 1012–15 (2006).
33. 75 U.S. 168 (1868).
34. 322 U.S. 533 (1944) [hereinafter *SEUA*].
35. U.S. CONST. art. 1, § 8, cl. 3.

Paul v. Virginia held that Congress lacked the power to regulate insurance providers because insurance policies were essentially local contracts, rather than goods flowing through channels of interstate commerce.[36] Seen in this way, the Court concluded that the insurance business was not within the ambit of either the Interstate Commerce Clause or the Dormant Commerce Clause — which prohibits states from passing legislation burdening interstate commerce[37] — leaving states to regulate the industry on their own.[38] This rationalization held sway for over three-quarters of a century, until the Court considered the validity of an insurance company's indictment on criminal antitrust charges in *United States v. South-Eastern Underwriters Ass'n*.[39] Squarely reversing *Paul*, the Court held that the "nationwide business [of insurance] is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature."[40]

The *SEUA* decision threatened to expose discriminatory state insurance laws to challenges under the Dormant Commerce Clause.[41] Congress quickly reacted by passing the MFA in 1945, within a year of *SEUA*, to restore the states' power to regulate

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36. 75 U.S. at 183.

37. *See* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 98 (1994) (citing Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) ("[T]he [Interstate Commerce] Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."); Gibbons v. Ogden, 22 U.S. 1, 17–19 (1824) (rejecting a concurrency theory of the commerce power and establishing that the states lack a commerce power that operates coterminously with federal power).

38. 75 U.S. at 183.

39. 322 U.S. at 534.

40. *Id.* at 547. Coming two years after *Wickard v. Filburn*, 317 U.S. 111 (1942), which established that a purely intrastate activity with cumulative effects on interstate commerce can be regulated under the federal commerce power, the *SEUA* decision can be viewed as capping the post–Hammer v. Dagenhart, 247 U.S. 251 (1918), pendulum swing back to a broad view of the Commerce Clause. *SEUA* recognized that an activity can be properly "in commerce" even if it is non-commercial, illegal or sporadic, and even if it does not "utilize common carriers or concern the flow of anything more tangible than electrons and information." *SEUA*, 322 U.S. at 549–50. Anything less far-reaching, the Court asserted, "would deprive the Congress of that full power necessary to enable it to discharge its Constitutional duty to govern commerce among the states." *Id.* at 551.

41. *See* Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 189 (2005) (noting that the *SEUA* decision "threatened to eliminate the immunity from Dormant Commerce Clause challenges enjoyed by discriminatory state insurance laws."). Note that state insurance laws were "discriminatory" in the sense that they impeded the ability of out-of-state insurance companies to do business in-state, not invidiously discriminatory in treating individuals differently based on arbitrary characteristics.

the insurance industry without the threat of attack under the Dormant Commerce Clause.[42] The National Association of Insurance Commissioners (NAIC), an association of state insurance commissioners, was influential in passing the legislation.[43] NAIC was concerned about maintaining states' power to tax the insurance industry, an important source of revenue,[44] and the insurance industry wanted immunity from antitrust regulation, "[b]ecause of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation."[45] Congress was responsive to these two constituencies, and enacted the MFA, with the twin goals of preserving state insurance regulations in the face of federal intrusion under the commerce power, and exempting the industry, in certain circumstances, from federal antitrust laws.[46]

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42. U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 499–500 (1993) ("To allay those fears [that states would no longer be able to regulate the insurance industry] Congress moved quickly to restore the supremacy of the States in the realm of insurance regulation. It enacted the McCarran-Ferguson Act within a year of the decision in *South-Eastern Underwriters*.").

43. *See* Raymond A. Guenter, *Rediscovering the McCarran-Ferguson Act's Commerce Clause Limitation*, 6 CONN. INS. L.J. 253, 291–92 (2000). The Supreme Court has noted that "[t]he views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 221 (1979).

44. Guenter, *supra* note 43, at 285 ("By the time of the SEUA decision, taxation of the insurance industry yielded hundreds of millions of dollars in tax receipts to the states. Interstate operations were responsible for a significant portion of that revenue.").

45. *Group Life*, 440 U.S. at 221.

46. Hahn v. Or. Physicians Serv., 689 F.2d 840, 841 (9th Cir. 1982). The House Committee Report accompanying the bill laid out its legislative purposes in such a way, emphasizing its intent to undo the effects of the *SEUA* decision: "Inevitable uncertainties which followed the handing down of the decision in the Southeastern Underwriters Association case, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials and others as to the validity of State tax laws as well as State regulatory provisions. . . . The purpose of the bill is twofold: (1) To declare that the continued regulation and taxation by the several States of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts. . . . It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case." H.R. REP. NO. 79-143 (1945).

B. SCOPE AND OPERATION OF THE MFA

The MFA achieved these goals by officially declaring that it is in the public interest for the federal government not to interfere with state regulation and taxation of the insurance industry,[47] and permitting specific state insurance statutes to reverse-preempt general federal laws. Section 2(b) of the MFA provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance."[48] This "reverse preemption" provision upends the normal operation of both the Supremacy Clause and the Dormant Commerce Clause;[49] the MFA provides that "silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such businesses by the several States."[50] Three criteria that must be met in order for the state law to govern:

> (1) the federal law in question must not be specifically directed at insurance regulation; (2) there must exist a particular state law (or declared regulatory policy) enacted for the purpose of regulating insurance; and (3) application of the federal law to the controversy in question must invalidate, impair or supercede [sic] that state law.[51]

Parts II.B.1, II.B.2, and II.B.3 will consider each of these requirements in turn.

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47. 15 U.S.C. § 1011 (2006).

48. 15 U.S.C. § 1012(b) (2006).

49. In spite of its unusual limitation of federal power, the MFA has withstood constitutional challenge. The Supreme Court has ruled that Congress can legitimize burdens on interstate commerce that would otherwise be unconstitutional by affirmatively declaring that state regulation and taxation of insurance is in the public interest. W. & S. Life. Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 653 (1981); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 431 (1946). Such a declaration effectively removes the implied restraint on state action that flows from the federal commerce power. *Prudential Ins.*, 328 U.S. at 430.

50. 15 U.S.C. § 1011.

51. Dehoyos v. Allstate Corp. 345 F.3d 290, 295 (5th Cir. 2003) (citing Humana, Inc. v. Forsyth, 525 U.S. 299 (1999)). However, the statute explicitly exempts the Sherman Act, Clayton Act, and Federal Trade Commission Act from its coverage. 15 U.S.C. § 1012(b).

1. *Requirement that the Federal Law Does Not Specifically Relate to Insurance*

In order for a state law to reverse-preempt federal law, the federal law must not "specifically relate[ ] to the business of insurance."[52] Given that the overarching goal of the MFA is to protect state insurance laws from the unintended effects of federal law on the business of insurance,[53] it is important to ascertain the intent of a federal statute; reverse preemption will result where the implications of the federal law for state regulation of insurance companies would be surprising.[54] For instance, a federal law authorizing national banks to sell insurance in small towns plainly reflects Congress's intent to regulate banking and insurance without being subject to local restrictions, and is not subject to reverse preemption.[55] By contrast, the federal Age Discrimination in Employment Act has surprising implications for insurers: its reference to "employers" does not clearly evince an intent to regulate insurance companies, and therefore incidental effects on state insurance law would be unexpected.[56]

Similarly, while courts have held that the FHA governs insurance discrimination,[57] they have also agreed that, because the statute is principally concerned with discrimination in housing markets and fails to mention insurance by name, it does not specifically relate to the business of insurance.[58] Therefore, it is uncontroversial that the FHA falls within the purview of the MFA.

2. *Requirement of a State Law or Regulatory Policy Enacted for the Purpose of Regulating Insurance*

The second prerequisite for reverse preemption is that the state law or regulation in question must have been enacted for

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52. *See id.*; *Dehoyos*, 345 F.3d at 295 (citing *Humana*, 525 U.S. at 307).
53. *See* Barnett Bank of Marion Cnty. v. Nelson, 517 U.S. 25, 39 (1996).
54. *Id.* at 40.
55. *Id.* at 41.
56. Murff v. Prof'l Med. Ins., 97 F.3d. 289, 291 (8th Cir. 1996).
57. *See infra* Part II.C.2.
58. *See* Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1360–61 (6th Cir. 1995); Lumpkin v. Farmers Grp., Inc., No. 05-2868 MA/V, 2007 WL 6996584, at *5 (W.D. Tenn. Apr. 26, 2007), *reconsideration denied,* 2007 WL 6996777 (W.D. Tenn. July 6, 2007); *infra* Part II.D.

the purpose of regulating insurance.[59] To satisfy this requirement, the regulated activity must be within the "business of insurance" and the state law must be intended to regulate that activity.[60] The Supreme Court has stated that there are three criteria for determining whether something falls within the business of insurance: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry."[61] The matter should be viewed holistically; no one factor is dispositive.[62]

The "business of insurance" encompasses both the writing of insurance contracts and the performance of those contracts.[63] This definition gives states wide latitude in regulating insurance and corollary issues; any law that "possess[es] the end, intention, or aim of adjusting, managing, or controlling the business of insurance" meets this second requirement.[64] Indeed, state statutes that regulate the business of insurance in the course of regulating in another area — such as insolvency proceedings[65] and dispute arbitration[66] — have been permitted to reverse-preempt federal law. But states' autonomy in this area is not without limit; cer-

59. 15 U.S.C. § 1012 (2006); Dehoyos v. Allstate Corp. 345 F.3d 290, 295 (5th Cir. 2003) (citing Humana, Inc. v. Forsyth, 525 U.S. 299 (1999)).

60. *See* Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co., Inc., 50 F.3d 1486, 1489 (9th Cir. 1995).

61. Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982) (citing Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979)).

62. *Id.*

63. U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 503 (1993).

64. *Id.* at 505; William Goddard, Note, *Swimming in the Wake of* Dehoyos*: When Federal Courts Sail into Disparate Impact Waters, Will State Regulation of Insurance Remain Above the Waves?* 10 CONN. INS. L.J. 369, 383 (2004) ("This test leaves a broad field of laws and regulations eligible for protection under the McCarran-Ferguson Act.").

65. *See Fabe*, 508 U.S. at 508–09 (holding that state laws governing the priority given to claims in liquidation proceedings of insolvent insurance companies regulated the business of insurance, as it related to the performance of insurance contracts and to the goal of protecting the interests of policyholders).

66. *See* Am. Bankers Ins. Co. of Fla. v. Inman, 436 F.3d 490, 494 (5th Cir. 2006) (holding that state law prohibiting arbitration of disputes relating to underinsured motorist coverage regulated the business of insurance, as dispute resolution is a key facet of the insurer-insured relationship).

tain activities may be too attenuated from the business of insurance despite implicating insurance to some degree.[67]

Under this definition of the "business of insurance," it is safe to say that state statutes regulating the criteria that may be used in underwriting insurance policies were adopted with the "end, intention, or aim" of managing the business of insurance.[68] As one commentator has observed, "[s]tate legislation empowering a state insurance department to regulate the components used in underwriting models, including the use of credit scores, would seem a natural extension of a state's power to regulate insurance underwriting."[69]

3. *Requirement of Federal Invalidation, Impairment, or Superseder of State Law*

A state law will only reverse-preempt a federal law if that federal law invalidates, impairs, or supersedes the state law.[70] There will be no grounds for reverse preemption if the two laws have similar objectives and can be applied in harmony with one another.[71]

"Invalidation," "impairment," and "superseder" each describe different modes of interference with state law.[72] The Supreme Court most recently elaborated on the meaning of these terms in *Humana, Inc. v. Forsyth*, holding that the application of the Racketeer Influenced Corrupt Organization Act (RICO) "advance[d]s [Nevada's] interest in combating insurance fraud" and therefore was not reverse-preempted by state law.[73] As explained in *Humana*, "invalidation" refers to a federal law render-

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67. *See*, *e.g.*, Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1087 n.17 (1983) (rejecting defense based on MFA in suit challenging employer's reliance on sex-based annuity tables on grounds that the practice of "offering a male employee the opportunity to obtain greater monthly annuity benefits than could be obtained by a similarly situated female employee" is simply an employment practice to which the MFA does not extend).

68. *See* Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1220 (11th Cir. 2001), *reh'g denied*, 29 Fed. Appx. 576 (11th Cir.).

69. Goddard, *supra* note 64, at 383.

70. 15 U.S.C. § 1012(b) (2006).

71. Humana, Inc. v. Forsyth, 525 U.S. 299, 302–03 (1999). This sub-Part will define the terms "invalidate," "impair," and "supersede." For a discussion of the application of this test, see *infra* Part III.B and Part III.C.

72. *See id.* at 307.

73. *Id.* at 314.

ing a state law ineffective in a self-executing manner.[74] "Superseder" also contemplates that the federal law will render the state law ineffective, but by supplying a substitute rule.[75]

But the test for determining whether federal law impairs state law is more nuanced: whether "application of the federal law would . . . frustrate any declared state policy or interfere with a State's administrative regime."[76] Impairment thus amounts to more than intrusion on a state's mere presence in the regulatory field, but less than a head-on collision between state and federal rules.[77] Applying the test for impairment requires an investigation of whether state and federal interests are compatible with one another: for example, federal law may enhance state law by providing additional remedies or liabilities, in which case reverse preemption would not result.[78] The *Humana* Court also suggested that a state agency's intervention in the lawsuit, identifying a declared state interest that would be weakened by application of federal law, may bolster a claim of impairment.[79]

Following *Humana*, courts deciding whether state law reverse-preempts the FHA under the MFA have focused on this newly articulated "impairment" test.[80] The different results they have reached are the subject of Part III.

C. STATE AND FEDERAL LAWS REGULATING INSURANCE SCORING IN HOMEOWNERS INSURANCE UNDERWRITING

Reverse preemption under the MFA necessarily implicates both state and federal law. Part II.C.1 provides an overview of relevant state laws governing insurance scoring in homeowners insurance, and Part II.C.2 explores federal laws that reach the matter.

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74. *Id.*

75. *Id.*; *see also* United States v. Holcomb, 657 F.3d 445, 448 (7th Cir. 2011) (citing Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003)) ("[O]nly federal laws expressly applying to insurance supersede state regulatory schemes.").

76. *Humana*, 525 U.S. at 310.

77. *Id.* at 308–09.

78. *See id.* at 309, 311.

79. *See id.* at 313 ("Nevada filed no brief at any stage of this lawsuit urging that application of RICO to the alleged conduct would frustrate any state policy, or interfere with the State's administrative regime.").

80. *See infra* Parts III.B and III.C.

1. *State Laws*

The vast majority of states regulate the use of insurance scoring in personal insurance policies.[81] These statutes and regulations address topics such as the notice consumers must receive if their credit information is used in an underwriting or rating decision;[82] the review available to a consumer denied insurance based on credit information; and procedures that insurance companies must follow if required to their insurance scoring model with the state insurance commission.[83]

Where insurance scoring is permitted, the composition of insurance scores is circumscribed to varying degrees.[84] Twenty-eight states have enacted statutes and/or regulations based on model legislation adopted by the National Conference of Insurance Legislators (NCOIL).[85] The NCOIL model act prohibits the denial or non-renewal of an insurance policy based on credit information, and also bars the use of factors such as ethnic group, income, and ZIP code in calculating an insurance score.[86] While many states prohibit the use of discriminatory factors in insurance rating,[87] others have adopted a more permissive policy, banning only outright refusals or non-renewals of policies based on a

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81. O'Neill, *supra* note 13, at 162.

82. *Credit Scoring and Credit History*, *supra* note 15. For example, if a California insurer denies or increases the rate of a personal insurance policy after obtaining a consumer credit report from an outside agency, it must disclose the name and address of that agency. CAL. CIV. CODE. § 1786.40 (West 2005).

83. *Credit Scoring and Credit History*, *supra* note 15.

84. *See* O'Neill, *supra* note 13, at 163.

85. *Overview of NCOIL-Based Insurance Scoring Legislation/Regulation*, NAT'L CONFERENCE OF INS. LEGISLATORS, http://www.ncoil.org/Docs/ InsuranceScoringChart.pdf (last visited Nov. 5, 2011); *see also* O'Neill, *supra* note 13, at 161 (noting influence of NCOIL act, but also opposition from consumer groups, including charges of unfair bias towards insurance industry). Consumers Union and the U.S. Public Interest Research Group have also proposed a model law that bans insurance scoring in all personal insurance policies, but this has yet to gain traction in state legislatures. *See* Garcia, *supra* note 22.

86. *Bill Summary of an NCOIL Model Act Regarding Use of Credit Information in Personal Insurance*, NAT'L CONFERENCE OF INS. LEGISLATORS, http://www.ncoil.org/Docs/ BillSummaryofCSMl.pdf (last visited Nov. 5, 2011).

87. *See*, *e.g.*, IND. CODE. ANN. § 27-2-21-16(a)(1) (LexisNexis 2011 Supp.) ("An insurer that uses credit information to underwrite or rate risks shall not . . . [u]se an insurance score that is calculated using income, gender, address, ZIP code, ethnic group, religion, marital status, or nationality of the consumer as a factor.").

consumer's insurance score.[88] Forty-five states and the District of Columbia have general anti-discrimination statutes that prohibit discrimination in the business of insurance on the basis of race, national origin or other individual characteristics.[89]

On the other end of the spectrum, several states have attempted to ban insurance scoring outright.[90] However, these regulations have not always withstood challenges in court. The Michigan Supreme Court, for example, recently held that the state insurance commissioner exceeded her authority in promulgating an administrative rule that banned insurance scoring in all personal insurance policies, contrary to the statutory language.[91] Since the Michigan decision, then, no state outlaws insurance scoring across the board — Maryland bans the practice as related to homeowners insurance,[92] while California,[93] Hawaii,[94] and Massachusetts[95] ban it in the auto insurance context.

2. *Federal Laws*

Several federal statutes arguably have implications for insurance scoring. The Fair Credit Reporting Act, concerned with protecting consumers' privacy, includes insurers in a list of acceptable users of consumer credit reports.[96] The Equal Credit Opportunity Act, while prohibiting discrimination in credit transactions on the basis of race, color, religion, national origin, sex, or marital status,[97] probably does not reach insurance transactions.[98] The

88. *See, e.g.*, KY. REV. STAT. ANN. § 304.20-042(1) (LexisNexis 2011) ("No insurer shall decline to issue, cancel, nonrenew, or otherwise terminate property and casualty insurance contracts covering personal risks solely because of credit history, or lack of credit history.").

89. *Redlining*, 50 STATE SURVEYS: INSURANCE: PROPERTY/CASUALTY (2011), *available at* Westlaw 0110 SURVEYS 79; *see, e.g.*, DEL. CODE. ANN. tit. 18, § 2304(22) (1999 & Supp. 2010) ("It shall be an unlawful practice for any insurance company licensed to do business in this State to discriminate in any way because of the insured's race, color, religion, sexual orientation or national origin. . . .").

90. O'Neill, *supra* note 13, at 163.

91. Ins. Inst. of Mich. v. Comm'r, Fin. & Ins. Servs., Dep't of Labor & Econ. Growth, 785 N.W.2d 67, 75 (Mich. 2010).

92. MD. CODE. ANN., INS. § 27-501(e-2)(2)(i)-(iii) (LexisNexis 2011).

93. CAL. INS. CODE. § 861.02 (West 2005).

94. HAW. REV. STAT. § 431:10C-207 (LexisNexis 2011).

95. 211 MASS. CODE. REGS. 79.05 (2011).

96. 15 U.S.C. § 1681b (2006).

97. 15 U.S.C. § 1691 (2006).

Civil Rights Act of 1866[99] prohibits racial discrimination in the making of contracts and in property transactions, but requires proof of intent to discriminate.[100] It is the Fair Housing Act, as a civil rights statute specifically targeting discrimination and discriminatory effects in the housing market, that most often has been marshaled against insurance scoring. This sub-Part focuses in particular detail on the provisions of the FHA that speak to insurance discrimination.

Although the issue was initially disputed, and has yet to be conclusively determined by the Supreme Court, the protections of the FHA almost certainly extend to homeowners insurance transactions.[101] This conclusion is based on the statutory text, U.S. Department of Housing and Urban Development (HUD) regulations, and the broad purpose of the FHA.

The FHA, passed by Congress in 1968, makes it illegal to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[102] Most courts that have considered the issue have found that discrimination in the pricing of homeowners insurance makes housing "unavailable" within the meaning of the FHA: one cannot obtain a mortgage without insurance, and it is very difficult to purchase a house without mortgage financing.[103] As the Seventh Circuit succinctly put it, "[n]o insurance, no loan; no loan, no house."[104]

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98. NAT'L CONSUMER LAW CTR., CREDIT DISCRIMINATION § 4.3.1 (4th ed. 2005 and Supp.).

99. 42 U.S.C. §§ 1981–82 (2006).

100. Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 389 (1982).

101. *See* Dana L. Kaersvang, Note, *The Fair Housing Act and Disparate Impact in Homeowners Insurance*, 104 MICH. L. REV. 1993, 1997–2006 (2006) (reviewing statutory language, legislative history, case law, and administrative regulations and concluding that the FHA applies to insurance).

102. 42 U.S.C. § 3604(a) (2006). The Fair Housing Amendments Act of 1988 also outlawed discrimination on the basis of disability. 42 U.S.C. § 3604(f) (2006).

103. Ojo v. Farmers Grp., 600 F.3d 1205, 1208 (9th Cir. 2010); Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1357 (6th Cir. 1995); NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992); Home Quest Mortg. LLC v. Am. Family Mut. Ins. Co., 340 F. Supp. 2d 1177, 1183 n.3 (D. Kan. 2004); Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 48 (D.D.C. 2002), *reconsideration denied*, 219 F. Supp. 2d 104 (D.D.C.); Lindsey v. Allstate Ins. Co., 34 F. Supp. 2d 636, 641 (W.D. Tenn. 1999); Strange v. Nationwide Mut. Ins. Co., 867 F. Supp. 1209, 1214 (E.D. Pa. 1994); McDiarmid v. Econ. Fire & Cas. Co., 604 F. Supp. 105, 107 (S.D. Ohio 1984). *But see* Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 423–35 (4th Cir. 1984) (relying on the lack

Furthermore, HUD, the federal agency tasked with implementing the FHA, has issued a regulation stating that prohibited activities under the Act include "refusing to provide . . . property or hazard insurance for dwellings or providing such . . . insurance differently because of race, color, religion, sex, handicap, familial status, or national origin."[105] Following the test of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[106] courts have deferred to HUD's construction of the FHA in this regard, finding the regulation to be reasonable.[107]

Finally, courts broadly interpreted the scope of the FHA, consistent with its declared policy of "provid[ing], within constitutional limits, for fair housing throughout the United States,"[108] a policy that the Supreme Court has deemed "broad and inclusive."[109] In determining whether the FHA extends to insurance discrimination, courts have cited legislative history providing that the FHA was designed "to eliminate the discriminatory business practices which might prevent a person economically able to do so from purchasing a house regardless of his race."[110] Courts have found that this purpose is served by prohibiting the discriminatory provision of homeowners insurance, which has the effect of stifling housing choice and residential integration.[111] Thus, for these reasons, most courts have found that the FHA proscribes insurance discrimination.

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of specific reference to insurance in the legislative history of the FHA, as well as subsequent failed amendments, to hold that the statute does not reach insurance). However, the later-enacted HUD regulation pertaining to insurance, *infra* note 105, appears to have superseded the *Mackey* ruling. *See Home Quest Mortg.*, 340 F. Supp. 2d at 1183 n.3; *see also* Fuller v. Teachers Ins. Co., No. 5:06-CV-00438-F, 2007 WL 2746861, at *4 (E.D.N.C. Sept. 19, 2007) (applying Supreme Court ruling in Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005), that an agency's interpretation of statute would trump prior judicial construction of state unless court's previous ruling unambiguously foreclosed agency's interpretation, to find that HUD regulation superseded *Mackey*).

104. *Am. Family*, 978 F.2d at 297.

105. 24 C.F.R. § 100.70(d)(4) (2011).

106. 467 U.S. 837, 843 (1984).

107. *Ojo*, 600 F.3d at 1208; *Cisneros*, 52 F.3d at 1360; *Am. Family*, 978 F.2d at 300–01. To date, no court has deemed this regulation to be an unreasonable interpretation of the FHA.

108. 42 U.S.C. § 3601 (2006).

109. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972).

110. Dunn v. Midwestern Indem., Mid-Am. Fire & Cas. Co, 472 F. Supp. 1106, 1109 (S.D. Ohio 1979) (quoting H.R. 3504, 95 Cong., 1st Sess. § 804 (1977)).

111. *See id.* at 1111.

This anti-insurance-discrimination provision of the FHA most often has been marshaled to target the practice of "redlining."[112] Historically associated with the disinvestment of the urban core across America,[113] redlining is the practice of "charging higher rates or declining to write insurance for people who live in particular areas (figuratively, sometimes literally, enclosed with red lines on a map),"[114] often because of the racial or ethnic characteristics of residents of those neighborhoods.[115] Courts that have recognized the application of the FHA to insurance have unanimously held that redlining violates the FHA, usually on intentional discrimination grounds.[116] A plaintiff whose insurance application has been denied can allege discrimination on the basis of his or her individual characteristics, but also on the basis of the characteristics of the neighborhood in which the plaintiff resides.[117] Intent to discriminate can be inferred where an insurer charges substantially higher premiums to residents of neighborhoods with high concentrations of minorities.[118]

Unlike redlining claims, however, lawsuits challenging insurance scoring under the FHA usually proceed on a disparate-impact theory of liability, as insurance scoring tends to be applied in a facially neutral way.[119] Although all the federal appellate courts have recognized a disparate-impact standard under the FHA,[120] the combination of disparate-impact and insurance claims is not an especially well-traveled litigation route,[121] and, to date,

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112. *See supra* note 103.

113. *See, e.g.*, John Hugh Gilmore, Note, *Insurance Redlining and the Fair Housing Act: The Lost Opportunity of Mackey v. Nationwide Insurance Companies*, 34 CATH. U. L. REV. 563, 577–78 (1985) (noting that redlining impedes flow of financing into communities, which in turn hampers attempts at community improvement as it is more difficult to repair or sell housing).

114. NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 290 (7th Cir. 1992).

115. Benjamin Howell, Comment, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101, 102 n.9 (2006).

116. *See supra* note 103.

117. *See* SCHWEMM, *supra* note 4, § 13:15.

118. *See* Lindsey v. Allstate Ins. Co., 34 F. Supp. 2d 636, 643 (W.D. Tenn. 1999).

119. *See* Ojo v. Farmers Grp., Inc., 600 F.3d 1201 (9th Cir. 2010), *certifying questions to* 356 S.W.3d 421 (Tex. 2011) (en banc); Saunders v. Farmers Ins. Exch., 537 F.3d 961 (8th Cir. 2008); Dehoyos v. Allstate Corp., 345 F.3d 290 (5th Cir. 2003); Lumpkin v. Farmers Grp., Inc., No. 05-2868 Ma/V, 2007 WL 6996777 (W.D. Tenn., July 6, 2007); *supra* note 23 and accompanying text.

120. *See supra* note 23 and accompanying text.

121. *See* Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1362 (6th Cir. 1995) ("HUD has never applied a disparate impact analysis to insurers."). *But see* Kaersvang,

there have been very few federal court rulings on the merits of such a claim[122] — largely because the majority of litigants have been thwarted by the MFA.[123] However, given courts' explicit approval of both insurance discrimination claims and disparate-impact theories under the FHA, the legal ingredients for an FHA claim combating disparate-impact discrimination in the insurance context would appear to already exist.[124] Plaintiffs may also be successful in analogizing insurance scoring to "reverse redlining." Unlike redlining, which intentionally limits access to insurance and credit, reverse redlining is the practice of intentionally *targeting* certain communities for unfair loans, usually on the basis of the predominant race or ethnicity of the neighborhood.[125]

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supra note 101, at 2013–17 (arguing that disparate impact standard applies to insurance discrimination and outlining burden-shifting framework in insurance context).

122. *See* Owens v. Nationwide Mut. Ins. Co., No. Civ. 3:03-CV-1184-H, 2005 WL 1837959, at *15 (N.D. Tex. Aug. 2, 2005) (granting defendant's motion to dismiss disparate-impact credit-scoring claim under FHA because plaintiff failed to present a less discriminatory alternative for achieving same business goals); Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 60–61 (D.D.C. 2002), *reconsideration denied*, 219 F. Supp. 2d 104 (D.D.C.) (holding that plaintiffs stated claim for disparate-impact discrimination under FHA where they alleged that insurer used insurance scores to determine eligibility for homeowners insurance).

123. *See infra* Part III.B and Part III.C.

124. Assessing the merits of such claims is both beyond the scope of this Note and well-covered elsewhere. *See*, *e.g.*, Kaersvang, *supra* note 101, at 2009–12; Latonia Williams, Note, *African American Homeownership and the Dream Deferred: A Disparate Impact Argument Against the Use of Credit Scores in Homeownership Insurance Underwriting*, 15 CONN. INS. L.J. 295, 311–20 (2008). This Note assumes that well-pleaded claims of disparate-impact discrimination resulting from insurance scoring can be successful if allowed to overcome MFA reverse preemption.

Where factually appropriate, plaintiffs may also be successful in incorporating theories of disparate impact resulting from subjective decision-making by individual officers of insurance companies; courts have approved such theories in the context of mortgage lending. *See* Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d 251, 253 (D. Mass. 2008) (holding that plaintiff stated a claim under FHA and ECOA regarding allegedly discriminatory home mortgage pricing policy that gave loan officers discretion to increase mortgage prices above par rate based on subjective factors); Garcia v. Country Wide Financial Corp., No. EDCV 07-1161-VAP (JCRx), 2008 WL 7842104, at *6–*8 (C.D. Cal. Jan. 17, 2008) (same).

125. United Cos. Lending Corp. v. Sargeant, 20 F. Supp. 2d 192, 203 n.5 (D. Mass. 1998). To establish a prima facie case of reverse redlining, a plaintiff must show: "(1) that she is a member of a protected class; (2) that she applied for and was qualified for loans; (3) that the loans were given on grossly unfavorable terms; and (4) that the lender continues to provide loans to other applicants with similar qualifications, but on significantly more favorable terms." Matthews v. New Century Mortg. Corp., 185 F. Supp. 2d 874, 886 (S.D. Ohio 2002). Reverse redlining claims have avoided reverse preemption under the MFA since they challenge lending, rather than insurance, practices; the MFA does not apply to credit laws.

Courts have increasingly recognized claims of reverse redlining under the FHA in the lending discrimination context, especially in the wake of the subprime mortgage crisis.[126] Some observers have argued that the use of insurance scoring is akin to reverse redlining, as it uses a factor highly correlated with race (credit scores) to price policies, resulting in minorities being charged higher premiums.[127] Ultimately, though, these claims cannot be successful if reverse preemption under the MFA prevents them from even being heard. The next part of this Note will look at how claims challenging insurance discrimination under the FHA are affected by the MFA.

D. INTERACTION OF THE MFA WITH THE FHA

As discussed in Part II.B, there are several requirements that must be met before the MFA will apply to a federal statute. This sub-Part explains why the MFA applies to the FHA and describes how courts have analyzed reverse preemption issues in redlining cases. The courts' approach to reverse preemption in redlining cases has informed their analysis in insurance scoring cases.

One of the prerequisites for the applicability of the MFA is that the federal statute in question does not specifically relate to insurance;[128] courts generally have agreed that the FHA does not specifically relate to insurance and is therefore subject to the MFA.[129] However, some courts have carved out broad MFA exemptions for federal laws in specific areas that are unconnected to the antitrust-related goals of the MFA.[130] For example, the Second Circuit has held that the primary purpose of the MFA is

126. *See, e.g.*, Mayor & City Council of Balt. v. Wells Fargo Bank, N.A., 631 F. Supp. 2d 702, 704 (D. Md. 2009).

127. *See* Wu, *supra* note 20, at 22.

128. *See supra* Part II.B.1.

129. *See* Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1360–61 (6th Cir. 1995); Lumpkin v. Farmers Grp., Inc., No. 05-2868 MA/V, 2007 WL 6996584, at *5 (W.D. Tenn. Apr. 26, 2007), *reconsideration denied,* 2007 WL 6996777 (W.D. Tenn.).

130. *See* Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 117 (2d Cir. 2001) (considering "national concern" of Securities Litigation Uniform Standards Act as preventing reverse preemption under MFA); Stephens v. Nat'l Distillers & Chem. Corp., 69 F.3d 1226, 1231 (2d Cir. 1995) (holding that Foreign Sovereign Immunity Act reflects paramount national concern with foreign policy and should not be reverse-preempted by MFA); Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1066 (2d Cir. 1982), *vacated on other grounds*, 473 U.S. 1223 (1983).

to "deal with the conflict between state regulation of insurers and the federal antitrust laws" and therefore Congress "had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as 'the business of insurance.'"[131] Under this construction, the MFA is not a bar to federal regulation of insurers in the civil rights arena or "in other areas of national concern."[132]

However, courts that have ruled on the narrower issue of the MFA's applicability to the FHA in particular have rejected the Second Circuit's categorical approach.[133] These courts view the statutory language of the MFA as dispositive: the statute's provision that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ."[134] literally refers to "no act of Congress," rather than "no act of Congress except civil rights statutes."[135] Because the FHA is probably not immune to the operation of the MFA, substantive inquiry has focused on whether the application of the FHA would impair, invalidate, or supersede any state law regulating insurance.[136]

The first round of this inquiry took place in the context of claims challenging insurance redlining, largely before the Supreme Court's decision in *Humana*.[137] This analysis tended to look for a direct conflict between state insurance law and the FHA as evidence of impairment under the MFA.[138] This was often a somewhat cursory exercise; that the FHA would not be reverse-

131. *Spirt*, 691 F.2d at 1065; *accord* Women in City Gov't United v. City of N.Y., 515 F. Supp. 295, 306 (S.D.N.Y. 1981); EEOC v. Wooster Brush Co. 523 F. Supp. 1256, 1265 (N.D. Ohio 1981), *rev'd on other grounds*, 727 F.2d 566 (6th Cir. 1984); Ben v. Gen. Motors Acceptance Corp., 374 F. Supp. 1199, 1203 (D. Colo. 1974).

132. *Spirt*, 691 F.2d at 1066.

133. *See, e.g.*, NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 294–95 (7th Cir. 1992) (explicitly disagreeing with *Spirt*).

134. 15 U.S.C. § 1012(b) (2006).

135. Ojo v. Farmers Grp., 600 F.3d 1205, 1209 ("By using the phrase 'No Act of Congress,' the text of McCarran-Ferguson could not be clearer. . . . By its plain terms, the McCarran-Ferguson Act applies to the FHA."); *Am. Family*, 978 F.2d at 294 (7th Cir. 1992) ("'No Act of Congress' could not be more comprehensive.").

136. *See Ojo*, 600 F.3d at 1209.

137. 525 U.S. 299 (1999).

138. *See* Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1363 (6th Cir. 1995); *Am. Family*, 978 F.2d at 295; Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 421 (4th Cir. 1984).

preempted under the MFA was almost a foregone conclusion, given that there were no specific state statutes on the books permitting arbitrary refusals to insure a home based on the race of the neighborhood's residents.[139] For instance, the Seventh Circuit, in *NAACP v. American Family Mutual Insurance Co.*, suggested that "[i]f Wisconsin wants to authorize redlining, it need only say so" — but without such an explicit approval of the practice, there could be no credible argument of impairment and thus no reverse preemption.[140] Where a state had not statutorily authorized the practice of redlining, it was implausible to argue that federal law outlawing redlining conflicted with state law, as there was nothing with which it could conflict.[141] As a result, all pre-*Humana* appellate decisions that considered the issue concluded that allowing challenges to redlining under the FHA would not interfere with the operation of state law so as to justify reverse preemption under the MFA.[142]

These decisions also rested on the principle that a federal statute's provision of similar or additional remedies does not produce a conflict with state law.[143] For example, the Sixth Circuit, in *Nationwide Mutual Insurance Co. v. Cisneros*, held that there was no conflict between Ohio's insurance code, which only provided for administrative procedures to resolve insurance grievances, and the FHA's provision for jury trials and unlimited punitive damages.[144] Similarly, the Seventh Circuit, in *American Family*, rejected the argument that the FHA would impair the state insurance code's own anti-discrimination provision on the grounds that "duplication is not conflict."[145]

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139. *See, e.g.*, *Mackey*, 724 F.2d at 421 (devoting one paragraph to discussion of MFA issue; finding no impairment where there was no specific North Carolina law relating to redlining).

140. 978 F.2d at 297.

141. *See Am. Family*, 978 F.2d at 297.

142. *See supra* note 138.

143. *See Cisneros*, 52 F.3d at 1363; *Am. Family*, 978 F.2d at 295.

144. 52 F.3d at 1363.

145. *Id.*; *see also* United Farm Bureau Mut. Ins. Co., Inc., v. Metro. Human Relations Comm'n, 24 F.3d 1008, 1015–16 (7th Cir. 1994) (following *American Family* in finding that redlining claim not reverse-preempted under MFA by Indiana law that also contained anti-discrimination provision; also holding that white plaintiffs have standing to challenge redlining under FHA).

The Eleventh Circuit, in *Moore v. Liberty National Life Insurance Co.*, also found that duplication is not conflict.[146] There, the plaintiffs brought a claim under the Civil Rights Act of 1866, alleging that Liberty National was intentionally charging low-income African-Americans higher life insurance premiums.[147] The MFA issue was whether a state insurance law that forbade unfair discrimination between individuals in the same class of life expectancy reverse-preempted the Civil Rights Act of 1866's provision prohibiting discrimination in the making and enforcement of contracts.[148] The court found that federal law complemented state law, rather than impairing it, explaining that:

> Liberty National asks us to make a substantial interpretive leap in our construction of Alabama's life insurance regulations. We are asked to assume that the abolition of one form of discrimination, as codified in section 27-11-12, amounts to a clear declaration by the state that all other forms of discrimination, however invidious, are acceptable. We cannot construe Alabama's scheme of insurance regulation in such a formalistic and narrow way. Absent more convincing evidence that racial discrimination in the insurance context is an integral part of Alabama's regulatory scheme, Liberty National's argument must fail.[149]

In other words, a state law prohibiting one mode of insurance discrimination should not be construed as implicitly authorizing others, and will not be impaired by a federal law that outlaws those additional modes of discrimination.

Thus, it is clear that, absent a specific state law permitting a practice such as redlining, intentional discrimination claims under federal statutes are not barred under the MFA on a theory of interference with state law. But the status of reverse preemption arguments in the context of insurance scoring is less certain. The combination of the underlying disparate impact theory of liability — rarely expressly provided for in state insurance codes — with the existence of specific state laws permitting the use of insur-

146. 267 F.3d 1209 (11th Cir. 2001), *reh'g denied*, 29 Fed. Appx. 576 (11th Cir.).
147. *Id*. at 1212.
148. *Id.*
149. *Id.* at 1222.

ance scoring strengthens insurer-defendants' reverse preemption arguments. The next Part of the Note will discuss how the reverse preemption debate plays out in insurance scoring litigation and analyze courts' divergent approaches in this area.

III. APPLICATION OF THE MFA TO INSURANCE SCORING CHALLENGES

The approach to reverse preemption outlined above has been developed largely in the context of insurance redlining, in which claims proceeded on theories of intentional discrimination and did not intrude on any body of state law specifically permitting redlining as a legitimate insurance practice. Thus, this case law has left open two distinct questions relevant to challenges to insurance scoring under the FHA. First, what is the outcome of a reverse preemption defense if the challenged practice involves a disparate impact on, rather than disparate treatment of, a protected class of individuals? Second, if a specific state law regulating the use of insurance scoring *does* exist, under what circumstances can that law be "impaired," for MFA purposes, by the application of federal law?

Part III.A elaborates on the differences between insurance redlining and insurance scoring challenges. Parts III.B and III.C outline courts' competing approaches to the issue of MFA reverse preemption of insurance scoring challenges under the FHA. Part III.B looks at what this Note will call the "narrow view" of impairment adopted by the Fifth Circuit and a Tennessee federal district court, which holds that the FHA complements state insurance law and, as such, does not bar FHA claims under the MFA. Part III.C discusses the "broad view" of impairment taken by the Eighth and Ninth Circuits, which finds that the FHA interferes with state law so as to justify MFA reverse preemption.

A. DISTINCTIONS BETWEEN INSURANCE REDLINING AND INSURANCE SCORING CLAIMS AND IMPLICATIONS FOR MFA REVERSE PREEMPTION

While the redlining cases have helped sketch some principles governing the interaction between the MFA and FHA, the facts of those cases allowed courts to avoid analyzing how a state insur-

ance law can be impaired by the FHA. Redlining was a simple issue to resolve because no state statute authorized the practice in the first place. All courts had to do was identify the absence of a state law *condoning* redlining before dispensing with the argument that state law would be invalidated, impaired, or superseded by federal law *prohibiting* redlining. Because no state law existed for federal law to potentially impair, courts had no need to develop a definition of impairment and did not have occasion to consider circumstances under which federal and state law may be applied "in harmony" in spite of an apparent tension.[150]

However, the analysis is not as easy to apply in the insurance scoring context, since many states have enacted statutes and rules governing the permissible use of insurance scores in rating and underwriting. This scenario raises further questions: What is needed to create a conflict in the insurance scoring context? Does federal law outlawing practices that have a disparate impact on a protected class impair a state statute permitting the neutral application of insurance scoring? Or would impairment only result where the state statute specifically contemplates and authorizes practices that have a disparate impact? Moreover, how should state regulatory goals be parsed? If a state insurance code both permits insurance scoring and disallows unfair discrimination, might it still be in regulatory harmony with federal law that prohibits the use of insurance scoring that has a disparate impact on minorities? Finally, how should courts apply the Supreme Court's direction in *Humana* — which postdates the major redlining cases — to investigate whether federal law impairs state law by interfering with the state administrative regime?[151]

These open questions demonstrate the need to develop a framework for analyzing what "impairment" means when state laws permitting insurance scoring exist, and for determining what effect, if any, general state bans against insurance discrimination have on the capacity of federal law to impair insurance scoring laws. Federal courts at both the district and appellate levels have been grappling with these issues, with inconsistent

150. *See* NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 295 (7th Cir. 1992); Mackey v. Nationwide Ins. Cos., 724 F.2d 419, 421 (4th Cir. 1984).

151. 525 U.S. 299, 310 (1999).

results. This Note now turns to a consideration of two basic approaches taken by the courts.

B. NARROW INTERPRETATION OF IMPAIRMENT UNDER THE MFA

One judicial approach to resolving MFA reverse preemption issues in insurance scoring cases involves narrowly construing federal law's impairment of state law. This narrow construction is informed by an expansive view of state anti-discrimination goals, which often leads to a finding of harmony between state law and federal civil rights statutes. Thus, the narrow construction avoids reverse preemption.

The legal claims confronting the courts have been similar: they assert that an insurance scoring program used to price homeowners insurance policies has a disparate impact on racial and ethnic minorities in violation of the FHA, resulting in minorities being charged higher premiums than similarly situated Caucasians.[152] Courts following the narrow construction of "impairment" have relied on several ideas, including the notion that additional remedies supplied by federal law complement, rather than disrupt, state law; statutory interpretation principles that suggest that state insurance laws prohibit disparate-impact discrimination; and the relevance of state statutory authority outside of the insurance code.

The narrow test of impairment in insurance scoring cases follows the Sixth Circuit in *Nationwide Mutual Insurance Co. v. Cisneros*[153] in affirming that additional remedies provided by federal law supplement, rather than impair, state law. While jury trials were the additional remedy at issue in *Cisneros*, here, courts have largely focused on private rights of action under federal law.[154] Following *Humana*'s rejection of an occupying-the-

152. *See* Ojo v. Farmers Grp., 565 F.3d 1175 (9th Cir. 2009), *reh'g granted*, 586 F.3d 1108 (9th Cir. 2009); Dehoyos v. Allstate Corp., 345 F.3d 290 (5th Cir. 2003); Lumpkin v. Farmers Grp., Inc., No. 05-2868 Ma/V, 2007 WL 6996584 (W.D. Tenn., Apr. 26, 2007), *reconsideration denied,* 2007 WL 6996777 (W.D. Tenn.). Although lower credit scores also correlate with lower overall rates of wealth accumulation, in addition to race and ethnicity, racial and ethnic minorities' overrepresentation in lower income brackets is not a coincidence. Rather, it is the product of a range of discriminatory practices discussed in this Note, including redlining and reverse redlining. *See, e.g.*, Wu, *supra* note 20, at 22–24.

153. 52 F.3d 1351, 1363 (6th Cir. 1995).

154. *See Dehoyos*, 345 F.3d at 299 n.8; *Lumpkin*, 2007 WL 6996584, at *7.

field approach to MFA reverse preemption,[155] the Fifth Circuit, in *Dehoyos v. Allstate Corp.*, has held that federal law does not interfere with state law simply because a state already has some mechanism in place to regulate insurance.[156] Where a state insurance code does not authorize private lawsuits to enforce violations, a private right of action under the FHA is the "only remedy available" to redress racial or ethnic insurance discrimination.[157] Moreover, the FHA simply enhances existing state statutes banning "unfair discrimination" between similarly situated individuals;[158] a state's limited approval of insurance scoring does not vitiate the broader goal of eliminating discriminatory practices in the insurance industry. As a federal district court stated in *Lumpkin v. Farmers Group*, "the goals of federal and Tennessee law are the same, preventing impermissible racial and ethnic discrimination, and the two bodies of law can be applied in harmony to effect that purpose."[159]

Courts following the narrow approach have interpreted state statutes to ban disparate-impact discrimination, and have declined to draw a distinction between intentional and disparate-impact discrimination claims for the purposes of MFA reverse preemption.[160] The *Lumpkin* court held that there was no reason to read the Tennessee proscription against "unfairly discriminatory" practices as contemplating only an intentional form of discrimination.[161] The court went on to state that a distinction between intentional discrimination and disparate impact claims "has not been recognized in controlling case law and is not man-

155. *See* 525 U.S. at 308 ("We reject any suggestion that Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise.").

156. *Dehoyos*, 345 F.3d at 299.

157. *Lumpkin*, 2007 WL 6996584, at *7.

158. *See, e.g.*, TENN. CODE. ANN. § 56-8-104 (2008). Tennessee law permits consideration of insurance scores in policy rating, although an insurer may not "use an insurance score that is calculated using income, gender, address, ethnic group, religion, marital status, nationality, education, or occupation of the consumer" as a negative factor in any insurance scoring methodology. § 56-5-402(8).

159. *Lumpkin*, 2007 WL 6996584, at *6. However, the court took for granted that "impermissible discrimination" comprises the same practices under both state and federal law. *See id.*

160. *See* Ojo v. Farmers Grp., 565 F.3d 1175, 1186 (9th Cir. 2009), *reh'g granted*, 586 F.3d 1108 (9th Cir. 2009); *Dehoyos*, 345 F.3d at 299 n.7; Lumpkin v. Farmers Grp., No. 05-2868 Ma/V, 2007 WL 6996777, at *4 (W.D. Tenn., July 6, 2007).

161. *Lumpkin*, 2007 WL 6996777, at *4.

dated by Tennessee insurance law."[162] Similarly, the Ninth Circuit, in *Ojo v. Farmers Group*, rejected the insurer's invitation to effectively "bifurcate" the anti-discrimination provision of the Texas insurance code into two phrases, one referring to intentional discrimination and the other referring to disparate-impact discrimination.[163] To embrace one theory while dismissing the other, the court reasoned, would be to violate a rule of statutory construction requiring courts to "give effect to a statute as a whole and not render it partially or entirely void."[164] These courts' conclusions that state insurance codes — like the FHA — provide for a cause of action against disparate-impact discrimination, as well as intentional discrimination, mean that there is actually a degree of congruence between state and federal law, in spite of a state's limited approval of insurance scoring. Moreover, courts have rejected the argument that disparate-impact discrimination claims are fundamentally more likely to interfere with state law.[165] Therefore, interpreting state law to prohibit disparate-impact discrimination has reinforced the conclusion that the FHA does not impair state law and can be applied in harmony with it.

The Ninth Circuit, in particular, has also grounded its narrow approach to "impairment" in anti-discrimination principles articulated by state fair housing law.[166] The *Ojo* court considered the Texas Fair Housing Act, and noted that, in enacting that statute, the Texas legislature intended for its interpretation to track that

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162. *Id.*

163. *Ojo*, 565 F.3d at 1185. This decision was subsequently reversed *en banc*. Ojo v. Farmers Grp., Inc., 600 F.3d 1201, 1204 (9th Cir. 2010), *certifying questions to* 356 S.W.3d 421 (Tex. 2011) (en banc). While it does not remain good law, it contains valid statutory-construction arguments that may be adopted by courts in the future. It is also worth noting that the *en banc* panel did not find fault with the initial rationale, but rather concluded that the resolution of the case turned on the proper construction of state law and certified the question to the Texas Supreme Court. *Id.*

164. *Ojo*, 565 F.3d at 1185–86.

165. *See Dehoyos*, 345 F.3d at 299 n.7 ("Appellants argue that disparate impact claims are particularly likely to impair state law. We do not agree, and in any case the conflicts Appellants warn of are entirely conjectural. . . . We therefore decline to differentiate claims of disparate impact and claims of intentional discrimination at this preliminary stage of litigation.").

166. 565 F.3d at 1184–85.

of the federal FHA.[167] Texas had also promulgated a regulation, identical to its federal counterpart, banning "both intentional and disparate impact race discrimination by insurers in 'refusing to provide' property insurance or providing such insurance 'differently.'"[168] Thus, the court concluded that it "would be remiss in recognizing the Texas FHA's *prohibition against* disparate impact discrimination while condoning the district court's interpretation that Texas's credit scoring law *permits* the same."[169]

Finally, though not a case about insurance scoring, the Eleventh Circuit's *Moore* decision has often been cited approvingly in these cases and provides an instructive example that other courts may yet follow.[170] In determining whether state life insurance law could reverse-preempt the Civil Rights Act of 1866, the court drew a critical distinction between state laws that *require* a given activity, and those that merely *permit* that activity.[171] The court upheld the application of the Civil Rights Act because there was no contrary state law *requiring* insurance companies to discriminate on the basis of race.[172] Likewise, courts may find this reasoning persuasive in the insurance scoring context. State insurance scoring laws are generally permissive, not mandatory,[173] and thus a federal law that outlaws insurance scoring with a disparate impact on minorities only bars a practice in which insurers *may* engage — not *must* engage — under state law.[174]

In sum, courts following the narrow approach to impairment have broadly construed the anti-discrimination purposes of state

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167. *Id.* at 1185 (quoting TEX. PROP. CODE § 301.002 (West 2007)) ("In enacting the Texas FHA, the Texas legislature sought to 'provide rights and remedies substantially equivalent to those granted under federal law.").

168. *Id.* at 1185 (citing 40 TEX. ADMIN. CODE § 819.124(b)(4) (2011)).

169. *Id.*

170. *See* Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209 (11th Cir. 2001), *reh'g denied*, 29 Fed. Appx. 576 (11th Cir.).

171. *Id.* at 1222 (citing SEC v. Nat'l Securities, Inc. 393 U.S. 453 (1969)).

172. *Id.*

173. *See, e.g.* TEX. INS. CODE ANN. § 559.051 (West 2009) ("An insurer *may* use credit scoring, except for factors that constitute unfair discrimination, to develop rates, rating classifications, or underwriting criteria regarding lines of insurance subject to this chapter.") (emphasis added).

174. Without explicitly embracing *Moore*'s permissive/mandatory distinction, the *Lumpkin* court employed a similar rationale: "Tennessee law does not mandate insurance scoring resulting in disparate impact, whether or not it is actuarially based. For laws to conflict, one has to prohibit an action, while the other requires or condones it." Lumpkin v. Farmers Grp., Inc., No. 05-2868 Ma/V, 2007 WL 6996777, at *7 (W.D. Tenn., July 6, 2007).

law and have found federal law to be in harmony with them. Where state statutes regulating insurance scoring exist, courts read them in light of anti-discrimination provisions in the insurance code as well as state fair housing laws. These courts have interpreted anti-discrimination provisions in state insurance codes as banning both intentional and disparate-impact discrimination, and, at any rate, are skeptical that there is a significant analytical distinction between the two forms of discrimination for purposes of MFA reverse preemption. They view private rights of action to enforce insurance-code violations as additional remedies that enhance, rather than interfere with, state administrative regimes. *Moore*, though not an insurance scoring case, suggests that there is also a relevant distinction between state insurance scoring laws that are permissive and those that are mandatory.

C. BROAD INTERPRETATION OF IMPAIRMENT UNDER THE MFA

The opposing approach developed by other federal courts takes a broader view of the impairment test, emphasizing the primacy of state law and allowing insurance claims under federal law to be reverse-preempted in a wider range of circumstances. In contrast to the narrower approach, this interpretation regards private rights of action supplied by the FHA as interfering with state administrative regimes; it treats disparate-impact claims as fundamentally different from intentional discrimination ones, and construes state statutes as disallowing the former; and it is skeptical of federal courts' institutional competence to structure insurers' business practices.

Rather than conceiving of federal private rights of action as additional remedies, courts taking the broader view of impairment worry that private rights will disrupt a finely wrought balance of power within the state.[175] In assessing a potential conflict between the FHA and Missouri insurance law, the Eighth Circuit, in *Saunders v. Farmers Insurance Exchange*, noted that, by allowing only for administrative redress of insurance code violations, the state made a well-considered decision to vest primary

175. *See* Saunders v. Farmers Ins. Exch., 537 F.3d 961, 968 (8th Cir. 2008); Taylor v. Am. Family Ins. Grp., No. 8:07CV493, 2008 WL 3539267, at *4 (D. Neb. Aug. 11, 2008).

enforcement authority in the state insurance agency.[176] These agency decisions are subject to judicial review only for arbitrary and capricious agency action, the court reasoned, and giving federal courts original jurisdiction over state insurance complaints would fundamentally interfere with the state's administration of its laws.[177] Therefore, a private right of action under the FHA intrudes upon the state administrative regime severely enough to warrant reverse preemption.

Courts adopting this broader test of impairment have also held that disparate-impact claims are not cognizable under state insurance law, and that applying federal disparate-impact rules would impermissibly interfere with state statutory structures.[178] Where disparate-impact liability is not expressly contemplated in anti-discrimination provisions of state insurance codes, these courts refuse to read it into the statutory text.[179] Furthermore, courts treat disparate-impact liability emanating from federal authority as fundamentally altering the way an insurer may set rates within a state; as the Eighth Circuit noted, "a suit challenging the racially disparate impact of industry-wide rate classifications may usurp core ratemaking functions of the State's admin-

176. *Saunders*, 537 F.3d at 968.

177. *Id.*

178. *See id.* at 965, 967; Ojo v. Farmers Grp., 356 S.W.3d 421, 424–33 (Tex. 2011). In analyzing whether disparate-impact liability under the FHA could be applied in harmony with state law, the Eighth Circuit departed from dicta in an earlier opinion that stated, "[w]ere the question presented here, we might agree with the Sixth and Seventh Circuits that the federal civil rights statutes do not impair state insurance regulation." Doe v. Norwest Bank Minn., N.A., 107 F.3d 1297, 1307 (8th Cir. 1997) (holding that a claim under the federal Racketeer Influenced and Corrupt Organizations Act was not barred by the MFA).

179. *See Saunders*, 537 F.3d at 965 ("[Plaintiffs] cite no authority extending [statutes prohibiting an insurer from canceling or refusing to insure or refusing to continue to insure because of race] beyond their plain meaning to cover a disparate impact of racially discriminatory pricing."); *Ojo*, 356 S.W.3d at 429 ("[B]oth sections . . . prohibit classifications *because of* or *based on* race. Neither statute broadens its application so as to prohibit practices that may 'otherwise adversely affect' or 'tend to deprive' an insured of an opportunity . . . ."). The Texas Supreme Court reached its conclusion in reliance upon extrinsic materials, including a report by the state insurance commissioner finding that the use of insurance scoring can have a disparate impact on minorities, but that the commissioner lacks authority to ban practices that are not intentionally discriminatory. *Ojo*, 356 S.W.3d at 431–33. The court took this as evidence that the legislature was aware of the potential disparate impact that could result from the authorization of insurance scoring, and, in spite of it, made a conscious decision not to include an express prohibition of disparate impact discrimination. *Id.* at 433.

istrative regime."[180] It is this restriction of the core business of insurance that makes courts uncomfortable, as well as the perceived impropriety of a federal court second-guessing the decisions of a state insurance commission.[181]

In light of both this lack of authorization of disparate-impact liability, and the existence of statutes and regulations that affirmatively permit insurance scoring, courts treat these cases as real-life illustrations of the hypothetical that the Seventh Circuit imagined in the *American Family* redlining case, in which an FHA challenge would be precluded by an unambiguous, enacted state law — in contrast to the facts presented in that case, where Wisconsin had not enacted any relevant statutes or regulations permitting redlining.[182] As one federal district court stated, quoting *American Family*, "Mississippi *has* enacted a regulation authorizing the activity about which the plaintiff complains, and therefore the plaintiff's 'challenge to that practice under the auspices of the Fair Housing Act' is untenable."[183]

Thus, the broad test of impairment parts ways from the narrow test on the significance of the private right of action, the proper construction of state anti-discrimination statutes, the relevance of the distinction between intentional discrimination and disparate-impact claims, and the breadth of regulatory harmony between state and federal anti-discrimination statutes. A model analysis of reverse preemption under the MFA in insurance scoring cases must present a satisfactory resolution of these issues while also staying true to the congressional intent of both the MFA and FHA. The next section of this Note proposes such an analysis.

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180. *Saunders*, 537 F.3d at 967.

181. *See id.* at 967–68; *accord* Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 564 (7th Cir. 1999) ("Even if the formal criteria are the same under federal and state law, displacing [administration of insurance policies] into federal court — requiring a *federal* court to decide whether an insurance policy is consistent with *state* law — obviously would interfere with the administration of the state law.").

182. NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 297 (7th Cir. 1992) ("If Wisconsin wants to authorize redlining, it need only say so; if it does, any challenge to that practice under the auspices of the Fair Housing Act becomes untenable.").

183. McKenzie v. S. Farm Bureau Cas. Ins. Co., No. 3:06CV013-B-A, 2007 WL 2012214, at *3 (N.D. Miss. July 6, 2007) (quoting *Am. Family*, 978 F.2d at 297).

IV. A MODEL ANALYSIS OF REVERSE PREEMPTION UNDER THE MFA IN INSURANCE SCORING CASES

In order to resolve the confusion that has been brewing in the federal courts, this Part develops a model analysis for MFA reverse preemption in cases challenging insurance scoring. This analysis broadly conceives of federal and state anti-discrimination goals articulated in both the federal FHA and state insurance codes, and would allow reverse preemption only where there is no state statutory authority — in either the insurance code, state fair housing law, or other source of authority — supporting insurance discrimination claims. This Part demonstrates how the proposed analysis both remedies weaknesses in the broad approach to reverse preemption and also supplements the narrower approach by developing a coherent theory of how reverse preemption should work in insurance scoring cases. Finally, it argues that the proposed approach properly honors congressional intent in enacting both the MFA and the FHA.

A. DEFICIENCIES AND UNINTENDED CONSEQUENCES OF THE BROAD TEST OF REVERSE PREEMPTION

The broad test of reverse preemption errs in relying on a set of flawed assumptions about the role of federal courts in policing insurance rating and the proper weight to assign market forces in justifying insurance discrimination. These flawed assumptions have led courts to privilege insulation of state administrative regimes over the application of federal civil rights statutes, resulting in a bizarrely asymmetrical framework for civil rights enforcement.

At the heart of the broad test of reverse preemption is a strong skepticism of the institutional competence of federal courts to monitor insurers' rates.[184] Insurers have successfully advanced

184. *See Saunders*, 537 F.3d at 968 (noting that setting and reviewing insurance rates is an "essentially legislative task"); Dehoyos v. Allstate Corp., 345 F.3d 290, 303 (5th Cir. 2003) (Jones, J., dissenting) ("[I]t seems clear . . . that federal courts are not competent to tread in the essential domain reserved to state regulators."); *see also* Matthew Jordan Cochrane, *Fairness in Disparity: Challenging the Application of Disparate Impact Theory in Fair Housing Claims Against Insurers*, 21 GEO. MASON U. C.R. L.J. 159, 192 (2011) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978)) (arguing that federal courts are "'generally less competent than [defendant companies] to restructure business

the argument that allowing the courts to police the factors used in ratemaking for disparate-impact discrimination would unacceptably transform the courts into a sort of "super actuary."[185] State insurance commissions, they argue, have the necessary expertise to perform the mathematically complex task of approving insurers' rates; by looking over the shoulders of these state agencies for any disparate-impact red flags, federal courts threaten to usurp this quasi-legislative ratemaking function by "unraveling a single thread, like credit scoring, that is a component of a risk formula [and] necessarily affects the entire fabric."[186]

This assertion both misperceives the nature of the relief sought by plaintiffs in these cases and ignores similar situations in which courts have properly taken on analogous roles. First, the plaintiffs have primarily sought compensatory damages and injunctions against the continued use of insurance scores in setting rates.[187] There is a qualitative difference between the relief sought in these cases — seeking a prohibition of a discriminatory factor — and demanding an affirmative declaration of the sole factors that may be considered in ratemaking and the relative weight to be accorded to each one. As the Fifth Circuit noted in *Dehoyos*:

> In engaging in the unremarkable task of determining whether specific conduct falls within the ambit of federal civil rights law, a court would no more become a "super actuary" than the court becomes a "super entrepreneur" each time the court must determine whether a discriminatory practice constitutes a business necessity.[188]

This suggests an avenue for federal courts to police disparate-impact insurance discrimination that is consistent with the role that courts have staked out for themselves in regulating discrim-

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practices.'"); Goddard, *supra* note 64, at 369 ("[O]versight of insurance pricing has long been the domain of state insurance regulators who carefully examine underwriting models and resulting rates for 'unfair' discrimination through formal rate approval mechanisms.").

185. *Dehoyos*, 345 F.3d at 297 n.5.

186. *Id.* at 300–01 (Jones, J., dissenting).

187. *See, e.g.*, Revised Second Amended Class Action Complaint at 16–17, Saunders v. Farmers Ins. Exch., 2002 WL 34424350 (W.D. Mo. 2002) (No. 497CV01104).

188. 345 F.3d at 207 n.5.

ination in other contexts. For example, in cases challenging predatory lending that have arisen in the wake of the subprime mortgage crisis, courts have not hesitated to enter the realm of mortgage pricing and set out norms for compliance with federal civil rights laws.[189] Indeed, prohibiting the use of factors that have a disparate impact on a protected class of individuals without a sufficient business justification is an ordinary application of judicial power in the civil rights context, supported by substantial precedent.[190]

The hands-off stance animating the broad test of reverse preemption is also related to a view that any disparate impact that results from insurance scoring can be justified by market forces.[191] Courts have often cited the proposition, stated in *NAACP v. American Family Mutual Insurance Co.*, that "risk discrimination is not race discrimination," and that "[t]o curtail adverse selection, insurers seek to differentiate risk classes with many variables."[192]

Implicit in this view is the notion that "policies that turn on competitive market forces do not 'yield to disparate impact analysis[,]'"[193] as a pricing system that is "the result of a complex of market forces[ ] does not constitute a single practice that suffices

189. *See, e.g.*, Matthews v. New Century Mortg. Corp., 185 F. Supp. 2d 874, 886 (S.D. Ohio 2002) (establishing four elements of prima facie case of reverse redlining, including whether "the loans were given on grossly unfavorable terms").

190. In the Title VII context, courts have not hesitated to proscribe the use of certain factors in employment decisions that have discriminatory effects, while avoiding laying out exact decision-making parameters. *See* Dothard v. Rawlinson, 433 U.S. 321, 331–32 (1977) (holding that height and weight standards for job applicants in prison system were not job related and had impermissible discriminatory effect on women, but failing to prescribe precise hiring framework); U.S. EQUAL EMPLOYMENT COMMISSION, DIRECTIVES TRANSMITTAL NO. 915.003, EEOC COMPLIANCE MANUAL (2006), *available at* http://www.eeoc.gov/policy/docs/race-color.html ("The law generally leaves it to the employer's business judgment to determine who should be hired or promoted.").

191. *See, e.g.*, *Saunders*, 537 F.3d at 967 (quoting MO. REV. STAT. § 379.318(2) (West 2002)) ("The Missouri insurance laws require insurers to establish rates based upon economic factors such as loss experience that are essential to insurer solvency, and permit insurers to classify risks based upon standards that 'measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses.'").

192. 978 F.2d 287, 290 (7th Cir. 1992).

193. Miller v. Countrywide Bank, N.A., 571 F. Supp. 2d. 251, 257 n.12 (D. Mass. 1998) (citing Am. Fed'n of State, Cnty., & Mun. Employees, AFL-CIO (AFSCME) v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985), *reh'g denied*, 813 F.2d 1034 (9th Cir. 1987) [hereinafter *AFSCME*]; *see also Credit-Based Insurance Scoring*, *supra* note 19 ("[C]onsumers benefit from insurance scoring because it keeps the insurance marketplace competitive, resulting in lower prices, better service, and more product choices.").

to support a claim under disparate impact theory."[194] But a policy's responsiveness to supply and demand should not be license to defer to the market when considering a charge of discrimination.[195] As a federal district court has noted, "[i]t is precisely because the market could not self-correct for discrimination that statutes like . . . the FHA . . . were necessary."[196] Moreover, courts should be cognizant of the intentionally discriminatory practices, such as redlining and reverse redlining, that have contributed to minorities' overrepresentation in higher-risk groups.[197] Judicial involvement in the area of insurance underwriting is justified to ensure that the effects of past discrimination are not perpetuated through existing (facially neutral) institutional practices.

From these assumptions flows a reverse preemption analysis that leads to absurd results and structural oddities. First, the basic premise that reverse preemption of federal disparate-impact insurance-discrimination claims protects the state insurance apparatus is undercut by the fact that reverse preemption still leaves the door open for similar claims under state fair housing laws, since many of these were enacted with the intent of mirroring federal law.[198] For example, at the very end of its opinion, the Eighth Circuit in *Saunders* noted that the Missouri

194. *AFSCME*, 770 F.2d at 1406.

195. *Miller*, 571 F. Supp. 2d at 257 n.12.

196. *Id.* at 258; *see also* Smith v. Chrysler Fin. Co., L.L.C., No. Civ.A. 00-6003(DMC), 2003 WL 328719, at *9 (D.N.J. Jan. 15, 2003) (denying defendant leave to provide amici curiae briefs in case challenging auto dealer's subjective "mark-up" to the objective buy rate of car under Equal Credit Opportunity Act, where "amicus curiae's argument that price setting flexibility is essential to a free marketplace . . . [was] inapplicable to the Court's understanding.").

197. *See, e.g.*, Wu, *supra* note 20, at 22–24.

198. *See, e.g.*, TEX. PROP. CODE § 301.002(3) (West 2007) ("The purposes of this chapter [the Texas Fair Housing Act] are to . . . provide rights and remedies substantially equivalent to those granted under federal law.").

Thirty-nine state agencies and the District of Columbia have received "substantial equivalence" certification from HUD, *Fair Housing Assistance Program (FHAP) Agencies*, U.S. DEP'T HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHAP (last visited Nov. 20, 2011) [hereinafter *FHAP Agencies*], an official determination "that the agency enforces a law that provides substantive rights, procedures, remedies and judicial review provisions that are substantially equivalent to the federal Fair Housing Act," *Substantial Equivalence Certification*, U.S. DEP'T HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHAP/equivalency (last visited Nov. 20, 2011) [hereinafter *Substantial Equivalence Certification*]. Once HUD has certified a state or local agency as substantially equivalent, it may refer to it complaints of housing discrimination. *Id.*

Human Rights Act allows for a private right of action to challenge insurance discrimination, but declined to address that argument as it was not preserved for appeal.[199] The court's failure to foreclose similar state-law claims suggests that state insurance-regulation regimes will be impaired by the application of federal law but not necessarily by identical state law outside the insurance code. It remains unclear why the exact same cause of action interferes with insurers' ratemaking ability differently depending on whether the cause of action originates in state or federal law.[200]

Moreover, this broad reverse preemption analysis unjustifiably establishes an asymmetrical framework for litigating civil rights claims. It creates two tiers of discriminatory activities: one tier encompassing practices such as refusing to rent or sell housing to an individual based on a protected characteristic, or discriminating in the terms and conditions of a lease or loan, and another tier comprising discrimination in the provision of insurance. If a discrimination victim is "lucky" enough to land in the first tier, he or she has access to relief under two sets of laws (state and federal); the unlucky rest are relegated to the second tier of discrimination, in which they are denied the right to recover under federal law. Such a distinction undermines the intended "broad and inclusive"[201] nature of the FHA and has no basis in statutory authority.

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199. Saunders v. Farmers Ins. Exch., 537 F.3d 961, 968–69 (8th Cir. 2008).

200. *Cf.* Brief for the United States as Amici Curiae Supporting Appellants and Urging Reversal, McClain v. Shelter Gen. Ins. Co., 2007 WL 6528260 (8th Cir. July 6, 2007) (No. 07-1903) ("[T]he relief available under the Fair Housing Act is no more extensive than the remedies that Missouri already makes available to victims of insurance discrimination under its own Human Rights Act. Consequently, insurance discrimination claims under the Fair Housing Act do not have any greater impact on Missouri's regulation of insurance than the state already permits under its own laws.").

The Texas Supreme Court has taken the position that disparate-impact insurance-discrimination claims are not cognizable under either the federal or state FHA, but this is based on the questionable conclusion that the federal FHA does not allow for the application of disparate-impact analysis to insurance, and the somewhat arbitrary subordination of the state FHA to the insurance code due to the insurance code's "more recent and specific" provisions. Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 434 (Tex. 2011). Indeed, the Texas Supreme Court's conclusion in *Ojo* has prompted HUD to reevaluate Texas's substantial equivalence status. E-mail from Timothy C. Lambert, Deputy Assistant General Counsel for Fair Housing Enforcement, HUD, to author (Oct. 24, 2011) (on file with author).

201. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972).

B. PROPOSED TEST OF REVERSE PREEMPTION

In putting forward a proposed standard for MFA reverse preemption in insurance scoring cases, this Note does not attempt to create a categorical exemption for civil rights statutes under the MFA;[202] rather, it seeks to formulate an framework that respects state law while giving adequate weight to state anti-discrimination goals, articulated both in insurance codes and elsewhere. The proposed analysis directs courts to ask the following questions: (1) whether the state has a statute or regulation on the books that purports to regulate the use of insurance scoring; (2) whether such a rule mandates the use of insurance scoring in making insurance decisions or instead simply permits it; (3) whether the insurance code contains a general anti-discrimination provision, and if so, what is its proper scope; and (4) whether the state has enacted its own version of the federal FHA that provides an independent cause of action to challenge disparate-impact insurance discrimination. This analysis synthesizes insights from the narrow approach while insisting on a more thorough consideration of potential overlap between federal and state law than the broad approach employs.

The first two factors, whether a state has enacted a rule regulating the use of insurance scores in insurance decision-making, and whether such a rule is mandatory or permissive, are concerned with finding a direct conflict between state and federal law. This analysis contemplates a direct conflict, and thus reverse preemption, only where a state law *requires* the use of insurance scoring.[203] Where a state law simply allows insurance scores to be used as one factor in calculating an insurance rate, or permits any factor to be used so long as it comports with anti-discrimination requirements, the state regulatory design is flexible enough to avert conflict with federal civil rights laws.

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202. *Cf. supra* note 131 (citing cases holding that civil rights statutes are not exempted from purview of MFA).

203. *Accord* SEC v. Nat'l Sec., Inc., 393 U.S. 463–64 (1969) (finding underlying goals of state and federal securities regulations to be consistent with one another where Arizona law did not "command[ ] something which the Federal Government seeks to prohibit"); Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1222–23 (11th Cir. 2001), *reh'g denied*, 29 Fed. Appx. 576 (11th Cir.) (holding that Alabama regulatory scheme did not require discrimination in the provision of life insurance and therefore did not conflict with federal anti-discrimination laws).

Where there is no direct conflict between state and federal law, *Humana* dictates that courts next look for a frustration of state policy or interference with the state administrative regime that will result from application of federal law.[204] In performing this analysis, courts must give adequate weight not just to state policy regarding the nuts and bolts of insurance administration, but also to state anti-discrimination goals expressed within the insurance code and in other state statutes. Thus, the third and fourth factors of the proposed test ask courts to assess the types of discrimination that a state prohibits, by reference to both the insurance code and state fair housing or human rights laws, as well as state courts' interpretations of these laws. It is therefore conceivable that, while a state insurance code may not expressly articulate a disparate-impact cause of action, that cause of action will be available elsewhere. Where independent state statutes provide a private right of action to challenge insurance discrimination, federal law that also bestows a private right of action will likely complement state law rather than impair it.

In practice, such an analysis likely will have the effect of allowing federal claims to proceed and limiting circumstances in which reverse preemption occurs. That thirty-nine state agencies and the District of Columbia have been certified by HUD as enforcing laws that are "substantially equivalent" to the federal FHA means that the vast majority of states provide remedies that are nearly identical to federal provisions.[205] At least in these states, this weighs heavily in favor of a finding of regulatory harmony between federal and state law for purposes of MFA reverse preemption.

In the eleven states where fair housing laws are not substantially equivalent to the federal FHA, federal law may still complement state law if that state also has enacted a broad anti-discrimination provision in its insurance code. In those states, though, it is important to parse the individual anti-discrimination insurance and fair housing statutes to determine whether they contemplate a cause of action for disparate-impact

204. Humana, Inc. v. Forsyth, 525 U.S. 299, 301 (1999).

205. *See FHAP Agencies*, *supra* note 198; *Substantial Equivalence Certification*, *supra* note 198.

insurance discrimination. Reverse preemption will result where those statutes clearly foreclose such a claim.

The foregoing analysis comports with congressional intent in enacting both the MFA and the FHA. A number of courts and commentators have stated that the MFA was intended to shield states from federal intrusion by way of exercising the commerce power; this suggests limited grounds for reverse preemption when the federal law at issue was not promulgated solely pursuant to Article I Commerce Clause authority.[206] A test that circumscribes the ability of state law to reverse-preempt federal law enacted pursuant to Section Two of the Thirteenth Amendment[207] is therefore congruent with the purpose of the MFA. Furthermore, such a test helps to realize the full integrative power of the FHA by avoiding the imbalanced framework that the broader test creates. Under the proposed test, there is a much stronger probability that the FHA will vindicate the rights of victims of insurance discrimination, just as it does for victims of any other kind of housing discrimination. Given the domino effect that access to insurance coverage has on financing and housing choice, allowing the FHA to combat insurance discrimination would constitute a significant step towards "protecting the freedom of individuals to choose where they want to live."[208]

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206. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 431 (1946) (stating that Congress enacted the MFA to protect state insurance regulation "from any attack under the commerce clause"); Life Partners, Inc. v. Morrison, 484 F.3d 284, 291 (4th Cir. 2007) (stating that the MFA was a congressional delegation of commerce power to the states); Guenter, *supra* note 43, at 256 (arguing that "conflicts between state insurance laws and federal laws that exercise non-interstate commerce clause authority should be resolved by applying traditional supremacy clause rules.").

207. U.S. CONST. amend. XIII, § 2 (stating that Congress shall have the power to enforce, by appropriate legislation, provisions of Thirteenth Amendment, which outlaws slavery); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–41 (1968) (stating that Congress has authority under Thirteenth Amendment to outlaw racial discrimination in housing as one of "the badges and the incidents of slavery."); United States v. City of Parma, Ohio, 661 F.2d 562, 573 (6th Cir. 1981), *reh'g denied*, 669 F.2d 1110 (6th Cir.) ("The Fair Housing Act was not enacted pursuant to the Commerce Clause. Rather it was based on authority of s[ection] 2 of the Thirteenth Amendment."). *But see* David A. Thomas, *Fixing Up Fair Housing Laws: Are We Ready for Reform?* 53 S.C. L. Rev. 7, 20 (2001) (quoting anonymous document in legislative history of FHA, which cites Fourteenth Amendment and Commerce Clause as constitutional bases for the legislation).

208. 114 CONG. REC. 2279 (1968) (statement of Sen. Brooke).

V. CONCLUSION

This Note examines the disagreement among federal courts on the proper application of the MFA to claims challenging insurance discrimination under the FHA, and proposes a model analysis for future courts that consider the issue. This Note shows that the so-called broad test of reverse preemption fails to honor congressional intent behind both the MFA and the FHA, and also creates a framework that provides unnecessary latitude to state insurance regimes at the expense of robust federal civil rights enforcement. In contrast, the proposed test looks for areas of harmony between state and federal law in order to give full effect to federal civil rights statutes without improperly encroaching upon state law.

In spite of the strength of the FHA on paper, segregation and housing discrimination persist across the country. But the face of housing discrimination has largely changed over the years, from overt racial intolerance to accepted industry practices that deepen "exclusionary patterns."[209] As the nature of discrimination has changed, so too have the legal tools to fight it. Insurance scoring is a prime example of a facially neutral practice with discriminatory effects, responsive only to litigation under the disparate-impact standard. The judicial disagreement over the application of the MFA to insurance scoring claims should be resolved to avoid reverse preemption where federal law simply complements state law, in order to chart a wider path upon which civil rights advocates may tread.

209. Havard, *supra* note 6, at 245.